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Information Technology Industry Council Submission on Investment

Abstract

This paper focuses on language in the draft text that the IT industry supports on investment. The specific preferred language is in blue italics. Language that we would like to see deleted is in red. New language is in black.

Referenced sections include:

Articles 2, 3, 6(1), 7(1), 9, 10(1), 12, 15(2),(3.1),(4) & (7).

We would particularly like to emphasize the need to incorporate new language limiting frivolous disputes under this chapter.

We also wish to emphasize the importance of including language protecting the free flow of data across borders as required for the operation of foreign investments and in support of free trade.

Investment

ITI supports the development of a strong investment chapter as part of the FTAA that incorporates all of the fundamental investment protections included in U.S. BITS and NAFTA Chapter 11. We are including detailed commentary on specific guarantees that should be included in an FTAA investment chapter as follows:

Article 2 and Article 3. No Discrimination

Foreign investors should be accorded the better of national treatment or most-favored nation treatment with respect to the establishment of investments and ongoing operations.

Article 6(1). Fair and Equitable Treatment

A Party shall accord to the investments of the investors of another Party treatment in accordance with international law, including fair and equitable treatment as well as juridical protection and security within its territory in accordance with the norms and principles of international law.

Article 7(1). Performance Requirements

The Parties may not impose any performance requirements incompatible with the disciplines of the Agreement on Trade-Related Investment Measures of the World Trade Organization, as a condition for establishing, expanding or maintaining investments.

Article 9. Transfers

Each Contracting Party shall permit investors of another Contracting Party the free transfer of investments and income. Parties may not use measures to correct balance of payments problems to restrict such transfers.

Article 10(1). – Expropriation and Compensation

No Party shall adopt measures to nationalize or expropriate, or any measure having the same effect, investments in its territory owned by investors from other Parties, unless such measures are adopted in the public or social interest, on a non-discriminatory basis and in accordance with due process of law. Such measures shall include provisions for the payment of a prompt, adequate and effective compensation.

Article 12. General Exceptions and Reservations

Delete 1.e and 1.h.

Article 15(2) and (3.1). Resolution of Investor-State Disputes

An investor of a Party may, on its own behalf or on behalf of an enterprise of another Party owned or controlled directly or indirectly by the investor, submit to arbitration under this section a claim on the grounds that a Party has breached an obligation under this section, provided that the claim made by the investor of a Party on its own behalf or on behalf of an enterprise is for loss or damage incurred by reason of, or arising out of, that breach.

New Language on Mechanisms to Eliminate Frivolous claims

ITI also urges the negotiators to seek impartial and independent mechanisms in the FTAA that will allow arbitrators to expeditiously eliminate frivolous claims. Any determination adverse to an investor that terminates the case would be subject to the appellate or review mechanism. A determination that the case should go forward would not be subject to review. Such a mechanism could incorporate elements of both a summary judgment motion and a motion to dismiss where the respondent could argue in a single proceeding that, taking all facts as alleged as true and construing them in the light most favorable to claimant, the complaint fails to state a claim upon which relief can be granted and that, as a matter of law, claimant is not entitled to recover damages. The procedure could also consist of exchanges of written briefs and a hearing. In order to ensure an expeditious disposition of such motions, negotiations should seek a time certain for the completion of this process, such as 90 days from the filing of the motion to dismiss.

Article 15(4). Settlement of a Claim through Consultation and Negotiation

Delete this section.

Investors should not be required to engage in lengthy consultations and negotiations to resolve investment disputes under this agreement. Nor should they be required to exhaust all local remedies, as these are frequently inadequate.

Article 15(7). Recourse to International Arbitration

The dispute may be submitted:

To the International Centre for Settlement of Investment Disputes (ICSID), created through the Convention on the Settlement of

Investment Disputes between States and Nationals of other States, signed in Washington on March 18, 1965, when the Contracting Parties have signed it and are members thereof;

Where one of the Contracting Parties has not signed and is not a member of the above Convention, the dispute may be submitted to the ICSID pursuant to the Additional Facility Rules